

*See Vol. 3381*

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# United States Court of Appeals

NINTH CIRCUIT

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NO. 20917 ✓

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ALLAN McCOWAN,

Defendant-Appellant

Appeal from the United States District Court  
Southern District of California, Central  
Division, Honorable Charles H. Carr, Judge.

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PETITION FOR REHEARING

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MAY 8 1967

FILED



Petition for hearing on following grounds:

I

The court erred in holding that the evidence was sufficient for the jury to find that McCowan "was neither the sender nor the sender's agent" and that "federal protection over this mail extended not only to the obtaining of the package from the Post Office but to McCowan's subsequent act of opening the package before it had been delivered to the addressee".....

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II

The prejudicial effect of the misconduct of the United States Attorney was such that it could not be cured by the instruction of the court to the jury.....

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Conclusion.....

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TABLE OF AUTHORITIES CITED

Cases

Benton v. United States (4th Cir. 1956) 233 Fed. 2d 491.....	3
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Honorable Charles H. Carr, Judge.

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PETITION FOR REHEARING

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Petitioner respectfully asks this Court for rehearing of its decision of April 4, 1967, affirming the judgment of the United States District Court. Said petition is made on the following grounds:



THE COURT ERRED IN HOLDING THAT THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT McCOWAN "WAS NEITHER THE SENDER NOR THE SENDER'S AGENT" AND THAT "FEDERAL PROTECTION OVER THIS MAIL EXTENDED NOT ONLY TO THE OBTAINING OF THE PACKAGE FROM THE POST OFFICE BUT TO McCOWAN'S SUBSEQUENT ACT OF OPENING THE PACKAGE BEFORE IT HAD BEEN DELIVERED TO THE ADDRESSEE."

We respectfully urge that under the facts, such conclusion is not sustained by the law and the cases cited. *United States v. Dogwood* (7th Cir.) 360 Fed. 2d 905, 908, we urge is in our favor and enumerates postal custody and receptacles covered by the law. No such situation as shown in the McCowan case is made a federal offense. The court, therefore, lacked jurisdiction. Remember: McCowan went to the post office with the sister - Jean Ortiz, together the package was mailed. The rings were entrusted to McCowan by Joan Ansel, and he would be answerable to her as agent or bailee. We again urge this law was not intended to cover the situation here depicted. In *United States v. Dogwood, supra*, the Court said:

"The record fully establishes that the defendant stole Walley's driver's license and therefore possessed it with the knowledge that it was stolen. But the evidence, although viewed in a light most favorable to the government merely shows that the defendant stole the license after the letter from which he abstracted it had been delivered to his mother, the landlady, who received or collected the mail for her tenants. But Sec. 1708 in defining the offenses it interdicts enumerates the postal custody, mail receptacles, and 'other authorized depository' for mail matter . . ."

*United States v. Dogwood, supra*,  
360 Fed. 2d 905, 908.





THE PREJUDICIAL EFFECT OF THE MISCONDUCT OF THE  
UNITED STATES ATTORNEY WAS SUCH THAT IT  
COULD NOT BE CURED BY THE INSTRUCTION OF THE  
COURT TO THE JURY.

Notwithstanding the admonition by the court, the Assistant United States Attorney attempted to do the same thing again. The court attempted to correct the damage, but one would be naive indeed to argue that an instruction could thus cure the prejudicial effect of such misconduct.

The Court's reasoning runs counter to the basic theory of *Michelson v. United States*, 335 U.S. 469, adopted with approval in *Benton v. United States* (4th Cir. 1956) 233 Fed. 2d 491. See also an expression by this Court in *Thurman v. United States*, 316 Fed. 2d 205, where the Court said:

"But the prejudicial effect of such material is notorious. 1 Wigmore, Evidence, Sec. 194 (3rd ed. 1940); McCormick, Evidence 327 (1954). Indeed, the danger is so strong that the jury will infer from unrelated criminal conduct that the defendant probably committed the offense charged, or will condemn the defendant either for the unrelated conduct or simply because he is a bad person, regardless of his guilt or innocence of the offense charged, that admission of such material is treated as obviously prejudicial and admonitory instructions are commonly considered inefficacious. See, e.g. *United States v. Magee*, 261 Fed. 2d 609 (7th Cir., 1958); *Sang Soon Sur v. United States*, 167 Fed. 2d 431, 433 (9th Cir., 1948). Cf. *Marshall v. United States*, 360 U.S. 310 . . . (1959).

"We cannot say that in this case the error 'did not influence the jury, or had but very slight effect.' *Kotteakos v. United States*, 328 U.S. 750, 764 . . . (1946). See *Hawkins v. United States*, 358 U.S. 74, 79 . . . (1958)."



## CONCLUSION

For the reasons stated, we respectfully ask for a rehearing and, as this may be a case of first impression, that it be heard by the court *en banc*.

Respectfully submitted,

RUSSELL E. PARSONS  
RICHARD CHRISTENSEN

BY: RUSSELL E. PARSONS

Attorneys for Appellant

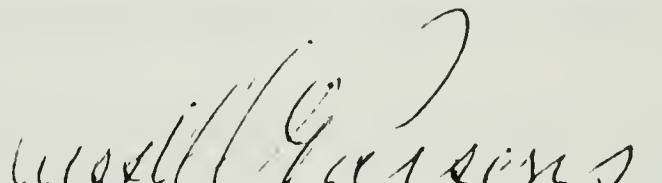


C E R T I F I C A T E O F C O U N S E L

STATE OF CALIFORNIA       )  
                                  )  
County of Los Angeles     )

I, RUSSELL E. PARSONS, attorney for Appellant MICHAEL  
ALLAN McCOWAN, do hereby certify that, in my opinion, the within  
Petition for Rehearing is well founded, and that it is not inter-  
posed for delay.

DATED at Los Angeles, California, this 2<sup>nd</sup> day of May,  
1967.

  
\_\_\_\_\_  
Russell E. Parsons



PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA                                 )  
  )  
County of Los Angeles                                 ) ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on May                 , 1967, I served the within PETITION FOR RE-HEARING (United States v. McCowan - No. 20917) on the following named party by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney  
Sixth Floor, Federal Building  
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May                 , 1967, at Los Angeles, California.

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D. A. Standefer

Subscribed and sworn to before me  
this         day of May         , 1967.

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Notary Public in and for  
the State of California

Orig & 20 copies: Clerk, U.S. Court of Appeals - Ninth Circuit  
U. S. Post Office and Court House Bldg.  
San Francisco, California 94101

